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No. 81-2394

In The

Supreme Court of the United States

October Term, 1982

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

—against—

JAMES H. TULLY, JR., *et al.*,
AS THE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANT

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May 2, 1983

QUESTION PRESENTED

Whether the practice of the State of New York in imposing more burdensome franchise taxes on the income of the corporate parent of a Domestic International Sales Corporation ("DISC") which arises from sales shipped from facilities outside New York and sales by affiliates of the parent which do not even transact business in New York, by means of a tax credit limited in application to shipments made from facilities in New York, violates the Commerce Clause of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?*

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* Westinghouse Electric Corporation was the Respondent-Appellant in the New York Court of Appeals. James H. Tully, Jr., Milton Koerner and Thomas H. Lynch, as the Tax Commission of the State of New York, were the Appellants-Respondents. A listing of all affiliates and subsidiaries of Westinghouse Electric Corporation (except wholly owned subsidiaries) appears in a Supplemental Appendix to the Jurisdictional Statement.

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BRIEF OF APPELLANT

DECISIONS OF THE COURTS AND AGENCY BELOW

The opinion of the Court of Appeals of the State of New York is reported at 55 N.Y.2d 364, 434 N.E.2d 1044 and 449 N.Y.S.2d 677, and is reprinted in the Joint Appendix ("J.A.") at pages 57-66. The opinion of the Appellate Division, Supreme Court of the State of New York, Third Judicial Department, is reported at 82 A.D.2d 988 and 440 N.Y.S.2d 397, and is reprinted at J.A. 50-54. An unpublished order of the Appellate Division, dated June 29, 1981, appears at J.A. 55-

56. The unpublished order of the Supreme Court of the State of New York, Albany County, transferring the proceedings to the Appellate Division, dated January 25, 1980, appears at J.A. 48-49. The unpublished decision of the New York State Tax Commission, dated August 31, 1979, appears at J.A. 41-47.

JURISDICTIONAL BASIS OF THIS APPEAL

This is an appeal from a final judgment of the Court of Appeals of the State of New York which upheld provisions of New York law imposing a tax on the shareholders of a DISC against the contentions that the statute violated the Commerce Clause of the United States Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The judgment of the New York Court of Appeals was entered on April 1, 1982. (J.A. 67.) The Notice of Appeal was filed on June 28, 1982. Probable jurisdiction was noted, limited to Question 1 presented by the statement as to jurisdiction, on January 17, 1983. This Court has jurisdiction of the appeal by virtue of 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the constitutional and statutory provisions involved in this case appears in the appendix to this brief as indicated:

Article I, § 8, clause 3 (Commerce Clause) of the United States Constitution appears at page 1a.

Amendment XIV, § 1 of the United States Constitution appears at page 1a.

New York Tax Law, Article 9-A, §§ 208.1, 208.8, 208.8-A, 208.9(a), 208.9(i), 209.1, 209.6, 210.1-210.3, 210.13, 211.1 and 211.4 (McKinney 1966 & 1974 Supp.), the provisions governing the State franchise tax on DISCs as in effect during the relevant years, appear at pages 1a-12a.

STATEMENT OF THE CASE

A. The Statutory Framework.

As part of the Revenue Act of 1971, Congress—with the intention to "provide tax incentives for U.S. firms to increase their exports" and thereby to "improve our balance of payments"[1]—authorized the establishment of a unique new corporate entity known as a "Domestic International Sales Corporation" or "DISC". Internal Revenue Code of 1954 ("I.R.C."), 26 U.S.C. §§ 991-997 (1967 & 1974 Supp.). A corporation qualifies as a DISC if substantially all of its assets and gross receipts are export related. I.R.C. §§ 992(a), 993.

Under the DISC provisions of the I.R.C. in effect in 1972 and 1973, the tax years here in question, and as relevant here, the income of a DISC was not taxed to the DISC at all. I.R.C. § 991. Instead, a portion of the DISC's income was taxed to the DISC's shareholder, I.R.C. § 995(a), which is typically the corporate parent of the DISC. A minimum of one-half of the DISC's income was taxed to its shareholders on a current basis whether or not it was actually paid or distributed to the shareholders (this income is known as "deemed distributions"). I.R.C. § 995(b). Taxes on the remaining income of the DISC were deferred until either that remaining income (known as "accumulated DISC income") was actually distributed to the DISC's shareholders or the DISC no longer qualified for special tax treatment. I.R.C. § 995. Effectively, then, up to one-half of a DISC's income was not taxed at all under the 1971 Act for as long as it was retained by the DISC.

In response to the Federal DISC legislation, New York in 1972 enacted the tax statute at issue here, 1972 N.Y. Laws, chs. 778, 779 (codified at N.Y. Tax Law §§ 208-219-a (McKinney 1966 & 1974 Supp.)), as an amendment to its general corpo-

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[1] H.R. Rep. No. 92-533 (92d Cong., 1st Sess.), *reprinted in* 1971 U.S. Code Cong. & Ad. News 1825, 1831; S. Rep. No. 92-437 (92d Cong., 1st Sess.), *reprinted in* 1971 U.S. Code Cong. & Ad. News 1918, 1928.

rate franchise tax. New York imposed its franchise tax based on the *total* income of a DISC. That is, New York taxed both deemed distributions from DISCs (which were subject to Federal tax) *and* accumulated DISC income (as to which all Federal tax was deferred). Moreover, in practical effect, New York also imposed its franchise tax on income of a DISC with respect to sales having no relation to New York by *including* in its computation of the DISC's income revenues derived from sales of affiliates not doing business in New York, while *excluding* the receipts, property and payroll of those affiliates from its apportionment calculations.

To cushion the effect of imposing a State tax on accumulated DISC income that was tax-free under Federal law, New York set the effective tax rate on such income at just 30% of the rate generally applicable under the franchise tax. This lower tax rate is afforded by means of granting a "DISC export credit". N.Y. Tax Law § 210.13(a). The credit is subject, however, to a limitation which is the focus of this appeal: The credit and concomitant reduced tax rate are available only with respect to gross receipts from products "shipped from a regular place of business of the taxpayer within [New York] state". N.Y. Tax Law § 210.13(a)(2).

Accumulated DISC income derived from shipments of products from locations in the United States outside of New York, including shipments by affiliates which do no business and have no contacts with New York, is taxed at the full corporate franchise tax rate. The express purpose of so limiting the DISC export credit to shipments made from New York was to encourage export sales to be made through facilities located in New York State. *See infra* pp. 13-14.

B. The Taxpayer and the Disputed Tax Assessment.

As stipulated by the parties below (J.A. 42-47), appellant Westinghouse Electric Corporation ("Westinghouse") is a Pennsylvania corporation engaged in the manufacture and sale of such products as electrical equipment, parts and appliances.

Westinghouse is qualified to and does business in New York, regularly paying corporate income and franchise taxes to the State. Westinghouse has a number of United States affiliates, however, which—as stipulated by appellees—do not do any business in New York ("non-New York affiliates"). (J.A. 4-5, 42-43.)

Westinghouse owns all of the stock of Westinghouse Electric Export Corporation ("Westinghouse Export" or "Export"), which qualifed as a DISC under I.R.C. § 992(a) in 1972 and 1973. Westinghouse Export acted as a commission agent on behalf of both Westinghouse and its non-New York affiliates for export sales of products manufactured in the United States and related services during 1972 and 1973. As stipulated, all of Export's income consisted of commissions on such sales. Under I.R.C. § 991, Westinghouse Export was exempt from Federal income tax for those years. In 1972 and 1973, Westinghouse Export had no employees in New York, did not engage in any business activities or maintain an office in New York, employed no capital in New York, did not own or lease real or tangible personal property in New York, paid no real estate rentals in New York, and did not file a New York corporate franchise tax return. (J.A. 42-43.)

Westinghouse Export's total income in 1972 was just under $26 million; of this amount, approximately one-quarter was received from Westinghouse-affiliated companies not doing business in New York and the remainder was received from Westinghouse itself.[2] On its 1972 Federal income tax return, pursuant to I.R.C. § 995(b), and on its 1972 New York State franchise tax return, Westinghouse included as income, and paid taxes upon, an amount of deemed distribution income equal to about one-half of Export's total income (or just under $13 million).[3] Similarly, in 1973, the income of Westinghouse

[2] Total Westinghouse Export income for 1972 was $25,987,000, of which $19,888,000 was received from Westinghouse and $6,099,000 from non-New York affiliates. (J.A. 16, 43.)

[3] The exact amount of income deemed distributed to Westinghouse by Export in 1972 was $12,956,500. (J.A. 43.)

Export was nearly $58 million, of which almost one-fifth was received from non-New York affiliates and the remainder from Westinghouse; $29.8 million of Export's income was deemed distributed to Westinghouse under I.R.C. § 995(b), was subject to Federal income tax and was reported on Westinghouse's New York State franchise tax return.[4] In both 1972 and 1973, Westinghouse incurred no Federal income tax liability for the approximately one-half of Export's income—its accumulated DISC income—that was not deemed distributed to Westinghouse.

This case arose when the New York State Tax Commission (whose members are appellees here) sought to include in Westinghouse's "entire net income" subject to the State franchise tax for 1972 and 1973 not only the amounts subject to Federal tax, but also the accumulated DISC income not subject to current Federal taxation. The State Tax Commission computed Westinghouse's franchise tax by combining all of Westinghouse Export's income, including that derived from sales by Westinghouse's non-New York affiliates, with that of Westinghouse pursuant to N.Y. Tax Law § 208.9(i)(B).

In apportioning Westinghouse Export's income to New York, however, the Commission excluded the receipts, property and payroll of Westinghouse's non-New York affiliates from the apportionment formula, thereby subjecting all of Export's income derived from sales on behalf of affiliates to the New York corporate franchise tax. By this procedure, the Commission taxed income that was earned by Export entirely through sales on behalf of Westinghouse's non-New York affiliates which, as noted, do not do business in the State.

Westinghouse's liability for tax on Export's accumulated DISC income was reduced by operation of the "export credit"

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[4] More precisely, Export's 1973 income was $57,948,738, of which $47,180,132 was received from Westinghouse and $10,768,606 from non-New York affiliates. Deemed distributions from Export to Westinghouse were $29,838,006, on which the latter paid Federal income and State franchise taxes. (J.A. 16, 43.)

pursuant to N.Y. Tax Law § 210.13(a). The amount of that credit was subject to a limitation (under N.Y. Tax Law § 210.13(a)(2)) based on the extent to which Export's income was attributable to shipments made from a regular place of business in New York. Only about 5% of Export's receipts came from such New York shipments. As a result, the Commission alleged deficiencies in Westinghouse's franchise tax payments of $71,970 for 1972 and $151,436.76 for 1973. (J.A. 14-15, 29, 44-47.)

C. The Proceedings Below.

In response to the State Tax Commission's notices of deficiency for 1972 and 1973, Westinghouse filed a petition, and later a perfected petition, for redetermination. (J.A. 19-28.) The perfected petition contended that, by requiring Westinghouse to compute its franchise tax liability by combining all of the receipts and expenses of Westinghouse Export with its own, thereby taxing income with which "New York lacked a jurisdictional nexus", appellees violated the Commerce Clause of the United States Constitution and the Due Process Clause of the Fourteenth Amendment. (J.A. 26.) Westinghouse also contended that limiting the tax benefits effected by the export credit to income attributable to shipments from New York violated the Commerce, Due Process and Equal Protection Clauses. (J.A. 27.) The State Tax Commission rejected Westinghouse's contentions, concluding that "the constitutionality of the laws of the State of New York is presumed at the administrative level." (J.A. 47.)

Westinghouse reiterated all of its constitutional claims against the franchise tax in a petition to the New York Supreme Court under Article 78, N.Y.C.P.L.R. (McKinney 1981), for review of the findings of the State Tax Commission. The Supreme Court transferred the proceedings to the Appellate Division, Third Judicial Department, for disposition. (J.A. 48-49.)

The Appellate Division, two justices dissenting, struck down a portion of the franchise tax. It held that N.Y. Tax Law § 208.9(i)(B) unconstitutionally burdened foreign commerce because it taxed accumulated DISC income which Congress had intended to exempt from all current taxation. This decision made it unnecessary for the Appellate Division to consider the constitutionality of New York's geographical limitation on the DISC export credit, because the credit itself applies only to accumulated DISC income. The Appellate Division went on to reject Westinghouse's constitutional challenges to New York's taxation of deemed distribution income. (J.A. 50-54.)

The State Tax Commission appealed from that portion of the Appellate Division decision invalidating section 208.9(i)(B), and Westinghouse cross-appealed from that portion upholding taxation of deemed distributions. Westinghouse again raised the constitutional arguments that it had presented to the State Tax Commission and the Appellate Division. The Court of Appeals rejected Westinghouse's constitutional claims and upheld the franchise tax in all respects. (J.A. 57-66.) Its judgment reversed the Appellate Division in part and reinstated the determination of the State Tax Commission. (J.A. 66, 67.)

SUMMARY OF ARGUMENT

The Federal DISC tax legislation was intended "to provide substantial stimulus" by way of "tax incentives for U.S. firms to increase their exports."[5] It did so by exempting qualifying DISCs (corporations which receive substantially all of their income from export transactions) from all tax, while taxing only about one-half of their income currently to their shareholders and indefinitely deferring the tax on the remaining "accumulated DISC income".

New York State, in order to subject DISC income to its franchise tax, required corporate taxpayers to consolidate the income of a DISC with that of its parent company. The franchise tax was then assessed against such total combined income, including any income derived by the DISC from other subsidiaries of the parent even if they did no business in New York and were not otherwise part of a unitary business with the parent. Fearing that taxing DISC income at the full New York franchise tax rate would discourage export trading activity in the State, New York enacted a credit applicable to the tax payable on accumulated DISC income, but limited that credit to income derived from exports shipped from a place of business in the State.

By limiting the DISC export credit to shipments made from within the State, New York violates the Constitution. The limitation on the credit provides a "direct commercial advantage to local business" in contravention of the Commerce Clause. *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). It provides such an advantage, and at the same time discriminates against export trade conducted from locations in other states, by taxing accumulated DISC income derived from out-of-state shipments at a rate more than three times that imposed on in-

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[5] H.R. Rep. No. 92-533, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1872; S. Rep. No. 92-437, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1928, 1996.

state shipments. Such discrimination is "virtually *per se* illegal." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977).

The lower court's justification of New York's limitation on the credit as providing "State tax incentives akin to" those of the Federal law to "ensure" New York's "competitive position vis-a-vis other states" (J.A. 63-64), conflicts with the basic purpose of the Commerce Clause. Indeed, the Commerce Clause was enacted precisely to prevent establishment of the sort of "preferential trade area" which New York has sought to create here. *Maryland v. Louisiana*, 451 U.S. at 754.

Nor can the limitation on the export credit be justified, as the Court of Appeals sought to do, on the grounds that the State is merely taxing a properly allocated fraction of the DISC's income and then forgiving some of the tax which it is entitled to levy. First, the Constitution is violated equally whether it is a tax or a credit which causes a discriminatory impact on commerce. Second, the apportionment formula as applied to the limited credit actually exacerbates the constitutional violation. While all of Export's income, including approximately 20-25% earned in transactions on behalf of Westinghouse affiliates which do no business in the State, is subjected to the New York tax, the denominator of the State's apportionment formula does not include the out-of-state payroll, property and receipts of those affiliates. New York is thereby taxing an excessive share of Export's income earned from non-New York sources, a fact which, when combined with the limitation on the credit, provides a powerful incentive to shift export operations to the State. The Constitution plainly proscribes this kind of discriminatory tax incentive.

ARGUMENT

THE NEW YORK FRANCHISE TAX UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE AND DISCRIMINATES AGAINST FIRMS EXPORTING PRODUCTS FROM OUTSIDE THE STATE BY SUBJECTING NEW YORK'S SHARE OF THEIR INCOME TO A GREATER TAX THAN THE SAME AMOUNT OF NEW YORK INCOME IN THE HANDS OF A PERSON WHO EXPORTS PRODUCTS FROM WITHIN NEW YORK STATE.

A. The Background of Federal DISC Legislation.

This case brings before the Court for the first time on plenary review a case arising out of the DISC provisions of the Internal Revenue Code.[6] As noted above, these provisions were originally enacted in 1971 because Congress concluded that "it is important to provide tax incentives for U.S. firms to increase their exports."[7] By this means, among others, Congress sought to "increase the number of jobs and diminish the high unemployment rate" in the United States and to "improve our balance of payments".[8] *See Caterpillar Tractor Co. v. United States,* 589 F.2d 1040, 1044 (Ct. Cl. 1978).

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[6] 26 U.S.C. §§ 991-997, added by the Revenue Act of 1971, Pub. L. No. 92-178, Title V, 85 Stat. 535 (1971). The DISC statute was amended in some respects after the tax years in question in this case by the Tax Reduction Act of 1975, 89 Stat. 26, and the Tax Reform Act of 1976, 90 Stat. 1525. *See generally* United States Department of the Treasury, 1980 Annual Report: The Operation and Effect of the Domestic International Sales Corporation Legislation 3-6 (December 1982) [hereinafter "DISC Report"].

[7] H.R. Rep. No. 92-533, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1872; S. Rep. No. 92-437, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1996.

[8] S. Rep. No. 92-437, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1918.

To serve these national goals, the DISC legislation was designed not only "to provide substantial stimulus to exports",[9] "but also to remove a present disadvantage of U.S. companies engaged in export activities through domestic corporations".[10] Prior to enactment of the Federal DISC provisions, such firms were "treated less favorably than [American firms] which manufacture abroad through the use of foreign subsidiary corporations".[11] *See also Caterpillar Tractor Co. v. United States,* 589 F.2d at 1044. In the former case, the United States corporation was fully and immediately taxable on its entire income from export sales. In the latter case, foreign tax might be minimal and United States tax was imposed only when (and if) income was remitted to the United States parent as a dividend. In addition, Congress recognized that "other major trading nations encourage foreign trade by domestic producers in one form or another", and the DISC statute was therefore aimed at "removing discrimination against those who export through U.S. corporations".[12]

For these reasons, Congress created the DISC. It established the statutory requirements for eligibility for special tax treatment, *see* I.R.C. §§ 992, 993, as well as more flexible intercompany pricing and commission rules, I.R.C. § 994. Congress exempted qualifying DISCs from taxation, I.R.C. § 991, while taxing only a portion (approximately 50%) of the DISC's income currently to its shareholders as "deemed distributions" and deferring indefinitely the tax on the remaining accumulated DISC income, I.R.C. § 995.

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[9] *Id.* at 1928.

[10] H.R. Rep. No. 92-533, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1872; S. Rep. No. 92-437, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1996.

[11] S. Rep. No. 92-437, *supra* note 1, 1971 U.S. Code Cong. & Ad. News at 1996.

[12] *Id.*

There can be no doubt of the economic significance of the Federal DISC legislation. According to Treasury Department statistics, as of 1980 there were over 7,900 DISCs with total gross receipts of nearly $132 billion, net income of $8.4 billion and tax deferred income of over $3 billion.[13] The Treasury estimated that the existence of the DISC legislation resulted in an increase in United States exports in 1980 of between $6.2 billion and $9.4 billion.[14]

B. The New York Tax Scheme for DISCs.

After enactment of the Federal DISC legislation, New York officials believed that, because of the manner in which the State franchise tax is structured, some provision for taxing DISCs would have to be made in order to avoid substantial revenue losses. For example, because New York does not generally impose its franchise tax on distributions received by a parent from a subsidiary (the subsidiary having been taxed directly to the extent that it does business in the State), a DISC's dividends would not have been taxable.[15] The State Budget Division noted that if DISCs were not taxed at all, New York might suffer revenue losses of as much as $20 to $30 million annually. *See* Budget Report, *supra* note 15, at 20.

On the other hand, the State was afraid that "full taxation of DISCs would undoubtedly encourage their formation outside the State, in states such as New Jersey, Connecticut and Massachusetts. If the DISC were formed outside of the State, its income might not be subject to any tax in New York." Budget Report, *supra* note 15, at 18. Accordingly, New York chose to require, in effect, the consolidation of the receipts,

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[13] DISC Report, *supra* note 6, at 28 (Table 5-2).

[14] *Id.* at 1.

[15] *See* New York Division of the Budget, Report on A. 12108-A and S. 10544 (May 23, 1972), *reprinted in* Bill Jacket of 1972 N.Y. Laws, ch. 778, at 13, 17-18 [hereinafter "Budget Report"].

assets, expenses and liabilities of the DISC and its parent company. N.Y. Tax Law § 208.9(i) (B).[16] The franchise tax was then to be assessed against the parent on the basis of the consolidated amounts, subject to various adjustments not relevant here. In addition, because "full taxation of DISC income to shareholders could detract from manufacturing of export goods within New York State", New York provided "a partially offsetting tax credit". Budget Report, *supra* note 15, at 18. But—with the express intention to "provide a positive incentive for increased business activity in New York State", Budget Report, *supra* note 15, at 18—New York limited this DISC export credit to income derived from exports shipped from a place of business within the State. N.Y. Tax Law § 210.13(a)(2). The limited export credit was to be a "tax advantage" that "would increase as the sales . . . of products from New York sources increase—a situation that provides an incentive to remain and possibly expand business in this state" and that would "encourage the continued development of export trade through the Port of New York", while maintaining New York's "competitive position in regard to the expansion of manufacturing facilities with neighboring states." Commerce Memorandum, *supra* note 16, at 11.

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[16] *See* New York Department of Taxation & Finance, Letter to Honorable Nelson A. Rockefeller (June 2, 1972), *reprinted in* Bill Jacket of 1972 N.Y. Laws, ch. 778, at 2, 5; New York Department of Commerce, Memorandum Recommending Approval of Assembly Bill 12108-A (May 24, 1972), *reprinted in* Bill Jacket of 1972 N.Y. Laws, ch. 778, at 9, 11 [hereinafter "Commerce Memorandum"].

C. New York's Taxation of DISCs Unconstitutionally Burdens Interstate Commerce and Discriminates Against Foreign Commerce Activity Conducted in States Other than New York.

As its legislative history makes clear, the purpose of limiting the DISC export credit was to pressure firms engaged in the export trade to locate operations in New York State. The Court of Appeals expressly recognized this:

> "The credit was devised . . . to provide shareholders of DISCs with State tax incentives akin to those that had been enacted by the Federal Government. Such credit was intended to ensure that New York would not lose its competitive position vis-a-vis other States which were also expected to offer tax benefits to DISC owners." (J.A. 63-64; citations omitted.)

The Court of Appeals failed, however, to recognize that the express legislative purpose of the New York tax, as well as its inevitable practical effect, is subversive of the most fundamental economic principles embodied in the Federal Constitution:

> "[N]o State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business. *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 458 (1959). *See Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 329 (1977)." *Maryland v. Louisiana,* 451 U.S. at 754.

As will be shown below, the New York tax provides precisely the forbidden "direct commercial advantage to local business."

The primary error in the analysis used by the Court of Appeals lies in its confusion of a State's powers in the area of economic development with those of the Federal government. It is, of course, constitutionally proper for the Federal government to encourage American firms to manufacture products for export by means of tax benefits such as those embodied in the DISC statute. By this means, the national government may

seek to increase domestic employment and improve our balance of payments, even at the expense of our trading partners overseas. If electric generators (to use appellant's products as an example) can thereby be manufactured more economically in Pittsburgh for shipment to Latin America, it is to be hoped that American workers will gain jobs, albeit at the cost of some employment in Japan or Germany.

But the Constitution does not permit a State to encourage the development of local industry by means of taxing measures which impose greater burdens on economic activities taking place outside the State than are imposed on similar activities within the State. Indeed, the "basic purpose" of the Commerce Clause is "to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution." *Maryland v. Louisiana*, 451 U.S. at 754 (citing *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 356). It is this "basic purpose" of which the court below lost sight.

This Court has not hesitated to strike down State taxes violative—as New York's is— of this principle. For example, in *Maryland v. Louisiana*, 451 U.S. at 725, Louisiana imposed a tax on the "first-use" of natural gas brought into the State which had not previously been taxed by another State or by the United States. Through a number of exemptions and credits, however, Louisiana users of natural gas were generally not burdened by the tax, while it uniformly applied to gas moving out of the State to consumers in the rest of the country. 451 U.S. at 732-33. The Court struck down this tax scheme, holding that it "unquestionably discriminates against interstate commerce in favor of local interests". 451 U.S. at 756.

Similarly, in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 318, New York had amended its stock transfer tax so that (a) the tax payable by nonresidents was reduced by 50% when the transaction involved an in-state sale but not when it involved an out-of-state sale and (b) a maximum tax of $350 was applied to a single transaction (by either a resident or

a nonresident) when the sale took place in-state but not when it took place elsewhere. This transfer tax amendment was held unconstitutional. Because it "foreclose[d] tax-neutral decisions and create[d] both an advantage for the [stock] exchanges located in New York and a discriminatory burden on commerce to its sister States", 429 U.S. at 331, the tax violated the principle that "no State may discriminatorily tax the products manufactured or the business operations performed in any other State", 429 U.S. at 337.

This case is controlled by *Boston Stock Exchange* and *Maryland v. Louisiana*. Not only is there discrimination against commerce carried on out-of-state, but even the discriminatory purpose expressed in the legislative history here, *see supra* pp. 13-14, parallels that noted in *Boston Stock Exchange*, *see* 429 U.S. at 323-28. The purpose and effect of New York's limitation of the DISC export credit to in-state export shipments is clear: The same amount of accumulated DISC income is taxed at a lower rate if the taxpayer chooses to export its products from a place of business located in New York rather than in another State. Thus, for the years in question here, New York's share of the accumulated DISC income earned by Westinghouse Export was taxed at a rate of 9% to the extent that export shipments were made from outside New York State, but only 2.7%[17] on shipments made from within the State. Put another way, a corporation with accumulated DISC income of $1,000, half of which is allocable to New York, would owe $45 in tax if it shipped its exports from facilities located in New Jersey. However, a firm with the same $1,000 of accumulated DISC income, of which the same one-half is allocable to New York—but shipping its products from the east side of the Hudson River—would owe just $13.50 in tax.[18] As in *Boston*

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[17] The relevant tax rate in 1972 and 1973 was 9%. N.Y. Tax Law § 210.1(a)(1). The DISC export credit is equal to 70% of the tax rate. N.Y. Tax Law § 210.13(a)(5).

[18] This amount is calculated by multiplying the accumulated DISC income ($1,000) by the New York allocation percentage (50%) and by the tax rate (9%), then subtracting a credit equal to

Stock Exchange, this differential taxation "forecloses tax-neutral decisions and . . . creates an advantage" for firms operating in New York and "a discriminatory burden on commerce to its sister States". 429 U.S. at 331.[19]

The Commerce Clause forbids precisely this sort of attempt to use discriminatory taxation to require " 'business operations to be performed in the home State that could more efficiently be performed elsewhere.' " *Boston Stock Exchange*, 429 U.S. at 336 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)). Indeed, " '[e]ven where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.' " *Id.* As *Pike v. Bruce Church, Inc.* makes clear, moreover, the fact that legislation was intended "to preserve or secure employment for the home State", as it was here, is further proof of unconstitutionality. 397 U.S. at 145-46. A State may not use the power to tax or to regulate business " 'to divert to [itself] employment and business which might otherwise go' " elsewhere; " 'the necessary tendency' " of such enactments " 'is to impose an artificial rigidity on the economic pattern of the

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70% of the tax: $1,000 × 50% × 9% = $45. $45 – ($45 × 70%) = $45 – $31.50 = $13.50. For simplicity, it is assumed that all of the taxpayer's exports are made either from in-state or out-of-state.

[19] The same result is required under the Equal Protection Clause of the Fourteenth Amendment. By limiting the export credit to in-state shipments, New York fails to treat export businesses operating across state lines in the same manner as such businesses operating entirely within New York. But once a State allows foreign corporations to do business within its borders, "the adopted corporations are entitled to equal protection with the state's own corporate progeny". *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949). As Justice Brennan has explained:

> "*Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation." *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 533 (1959) (Brennan J., concurring).

See also Concordia Fire Ins. Co. v. Illinois, 292 U.S. 535, 545-47 (1934); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507-08 (1926); *Southern Ry. v. Greene*, 216 U.S. 400, 412, 417-18 (1910).

industry.'" *Id.* at 147 (quoting *Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948)).

In short, the limitation of the franchise tax credit in N.Y. Tax Law § 210.13(a)(2) is unconstitutional because it diverts the natural flow of our nation's interstate commerce to New York from locations in other States from which exporters may find it more economical to ship. Such a burden on interstate commerce must be struck down "when the avowed purpose of the obstruction, as well as its natural tendency, is to suppress or mitigate the consequences of competition between the states." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).[20]

Despite the patently discriminatory purpose and effect of the limited DISC export credit, the Court of Appeals upheld it as an instance of legitimate competition with other States because "the business allocation percentage plays an integral role in computing the tax credit." (J.A. 65.) Using the allocation percentage, according to the Court of Appeals, means that "when the State exercises its taxing power, it does so consistently with due process mandates". (J.A. 65.) Thus, the court argued, by limiting the DISC export credit to in-state shipments, the State "simply forgives a portion of that income which New York may tax by reference to shipments of export property from a regular place of business in New York, an additional New York relationship." (J.A. 65.)

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[20] Justice Cardozo went on to recognize in the *Baldwin* case— a case which this Court found to be "particularly relevant to" its decision in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. at 335 n.14—that State laws must fall when they "would neutralize the economic consequences of free trade among the states":

> "What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used . . . with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents."

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. at 526, 527.

In so ruling, the Court of Appeals overlooked two crucial problems. First, the court's premise that the State's use of the allocation formula satisfied any due process concerns was unfounded. In fact, the State's taxation of DISC income derived from the activities of Westinghouse's non-New York affiliates, coupled with its exclusion of those affiliates' receipts, property and payroll from the apportionment formula, violates the Due Process Clause. Second, "forgiveness" does not cure a discrimination which arises from the act of forgiving. The fact that appellees may tax real property situated in the State of New York does not justify a tax credit limited to a single race of landowners.

The Court of Appeals' argument that "New York need not tax all which it has the right to tax" (J.A. 65) simply begs the question. The fact that New York discriminates against exports shipped from other States by disallowing a tax credit for such shipments, rather than by some other means, is constitutionally irrelevant. A "state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the State's tax scheme." *Maryland v. Louisiana*, 451 U.S. at 756. The question is " 'whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' " *Id.* (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940)). The logic used by the Court of Appeals is foreclosed by *Maryland v. Louisiana*, where a uniform tax was held to be unconstitutional because discrimination against interstate commerce was "the necessary result of various tax credits and exclusions" which benefitted only in-state consumers of gas. 451 U.S. at 756. It is enough that the limitation of the DISC export credit will "in its practical operation work discrimination". *Id.*[21]

Indeed, the theory enunciated by the Court of Appeals could be used to justify any discriminatory tax so long as the

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[21] *See also Mapco, Inc. v. Grunder*, 470 F.Supp 401, 406, 411-14 (N.D. Ohio 1979) (striking down Ohio tax on in-state use of low-sulfur coal because virtually all such coal was imported from other States while Ohio produced only high-sulfur coal).

legislature first levied a proper tax and then forgave a portion of it only to the favored few. But the class whose tax is forgiven also must be chosen in a constitutionally legitimate manner. New York would never contend that, since it may constitutionally impose an equal sales tax on all transactions within the State, it could also forgive 70% of that tax when a sale was made by a merchant belonging to a particular racial or religious group. Similarly, the Commerce Clause guarantees substantially equal treatment to an export business whether it is conducted inside or outside of New York.

In addition, as noted above, the discriminatory effect of limiting the DISC export credit to New York shipments is exacerbated because, in calculating the franchise tax and credit, New York requires that the income and expenses of a DISC be collapsed into those of its parent. For Westinghouse, this requirement means that it is taxed on that portion of Export's income—20-25% during the years in question—which is derived from export sales on behalf of Westinghouse affiliates which do no business whatsoever in New York. *See supra* pp. 5-6 & nn. 2-4.[22] But because the combination requirement for DISC taxation includes only Westinghouse and Export—and not the non-New York affiliates—the apportionment percentage (by which the combined income figure is multiplied to allocate New York's share of income) is too high. That is, while the income total includes Export's income earned in

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[22] Appellees have never claimed that Westinghouse's non-New York affiliates are part of a unitary business with Westinghouse or are otherwise taxable in New York. Indeed, the same State Tax Department Field Audit Report that recommended taxing Westinghouse on all of Export's income expressly recognized that Westinghouse's other "subsidiaries are, in general, autonomous in nature with employees of their own and independent places of business. Merchandise transactions are consummated at the equivalent of 'arms length' and the taxpayer [Westinghouse] is reimbursed by its subsidiaries for services rendered in their behalf. No distortion to the New York Tax base from transactions between the parent company and other affiliated companies is evident and the financial status of each company can be independently determined." (J.A. 12.)

respect of Westinghouse's non-New York affiliates—$6.1 million in 1972 and $10.8 million in 1973—the apportionment formula is not adjusted to include the payroll, property and receipts of the non-New York affiliates whose sales generated that income for Export. Since, by definition, the non-New York affiliates have no payroll, property or receipts in New York, this omission from the allocation formula of the amounts of such factors attributable to them means that the denominator of the formula is too small and the resulting percentage too high.

Thus, by ignoring the property, payroll and receipts of the non-New York affiliates in calculating the apportionment formula, while using instead the combined apportionment formula of Westinghouse and Export, appellees necessarily overstate the amount of Export's income allocable to New York. In so doing, they reach out to tax part of Export's income which is allocable entirely to business activities which have no nexus with the State. While this constitutes an independent constitutional violation,[23] it is significant here because it constitutes an additional means by which New York pressures corporate taxpayers to shift business activities from outside the State to places of business within New York. Again, "in its practical operation", the New York DISC taxation scheme "work[s] discrimination against interstate commerce". *Maryland v. Louisiana*, 451 U.S. at 756.

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[23] Because of the defects identified in the text in New York's application of its apportionment formula to the Westinghouse/Export combination, New York fails to limit its franchise tax to amounts " 'rationally related to "values connected with the taxing state" ' ". *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 102 S. Ct. 3128, 3134-35 (1982) (citations omitted).

CONCLUSION

For the foregoing reasons, New York's method of taxing accumulated DISC income derived from the sales of Westinghouse shipped from points outside New York and the sales of its affiliates which do not do business in New York should be declared violations of the Commerce Clause of the United States Constitution and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The judgment of the Court of Appeals should be reversed and the case remanded for assessment of Westinghouse's franchise tax liability in accordance with controlling constitutional principles.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Article I, Section 8

The Congress shall have Power . . .

[3] To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK TAX LAW, ARTICLE 9-A

(as in effect in 1972 and 1973)

New York Tax Law § 208.

As used in this Article:

1. The term "corporation" includes a joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument; a "DISC" and a "former DISC" mean any corporation which meets the requirements of subsection (a) of section nine hundred ninety-two of the internal revenue code of nineteen hundred fifty-four. . . .

New York Tax Law §§ 208.8, 208.8-A

8. The term "business income" means entire net income minus investment income;

8-A. Provided, however, that with respect to a DISC or a former DISC, the following provisions shall apply:

(a) investments in the stocks, bonds or other securities of a DISC or any indebtedness from a DISC shall not be treated as either subsidiary capital or investment capital under subdivisions four or five of this section,

(b) any amounts deemed distributed from a DISC or a former DISC which are taxable as dividends pursuant to subsection (b) of section nine hundred ninety-five of the internal revenue code of nineteen hundred fifty-four shall be treated as business income, except any such amounts from a former DISC attributable to amounts includible in a taxpayer's entire net income for a prior taxable year under subparagraph (B) of paragraph (i) of subdivision nine of this section shall be excluded from entire net income,

(c) any gain recognized for federal income tax purposes on the disposition of stock in a DISC, and any gain recognized on the disposition of stock in a former DISC, includible in gross income as a dividend pursuant to subsection (c) of section nine hundred ninety-five of the internal revenue code of nineteen hundred fifty-four, shall be treated as business income, and

(d) except as provided in paragraph (i) of subdivision nine of this section, any actual distribution from a DISC or a former DISC shall be treated as business income except an actual distribution which for federal income tax purposes is treated as made out of "other earnings and profits" under section nine hundred ninety-six of the internal revenue code of nineteen hundred fifty-four, in which case such actual distribution shall be treated as either subsidiary income or investment income under this article.

New York Tax Law § 208.9(a)(1)

9. The term "entire net income" means total net income from all sources, which shall be presumably the same as the entire taxable income which the taxpayer is required to report to the United States Treasury Department, or which the taxpayer would have been required to report, if it had not made an election under subchapter s of chapter one of the internal revenue code, except as hereinafter provided, and subject to any modification required by paragraph (d) of subdivision three of section two hundred ten of this article.

(a) entire net income shall not include:

(1) income, gains and losses from subsidiary capital which do not include the amount of a recovery in respect of any war loss except for such amounts from a former DISC which are treated as business income under subdivision eight-A of this section . . . .

New York Tax Law § 208.9(i)

(i) With respect to a DISC which during any taxable year or reporting year (1) received more than five percent of its gross sales from the sale of inventory or other property which it purchased from its stockholders, (2) received more than five percent of its gross rentals from the rental of property which it purchased or rented from its stockholders or (3) received more than five percent of its total receipts other than sales and rentals from its stockholders, the following provisions shall apply.

(A) For any taxable year in which sub-paragraph (B) of this paragraph is in effect and not rendered invalid, a DISC meeting the above test shall be exempt from all taxes imposed by this article.

(B) Supplemental to the provisions of subdivision five of section two hundred eleven of this article, any taxpayer required to compute a tax under this article, which during the taxable year being reported was a stockholder in any

DISC meeting the test prescribed in this paragraph, shall for any taxable year ending after December thirty-first, nineteen hundred seventy-one adjust each item of its receipts, expenses, assets and liabilities, as otherwise computed under this article, by adding thereto its attributable share of each such DISC's receipts, expenses, assets and liabilities as reportable by each such DISC to the United States Treasury Department for its annual reporting period ending during the current taxable year of such taxpayer; provided, however, (1) that all transactions between the taxpayer and each such DISC shall be eliminated from the taxpayer's adjusted receipts, expenses, assets and liabilities; (2) that the taxpayer's entire net income as otherwise computed under this section, shall be reduced by subtracting the amount of the deemed distribution of current income, if any, from each such DISC already included in the entire net income of such taxpayer by virtue of having been included in its entire taxable income for that taxable year as reported to the United States Treasury Department; and (3) that in the event this paragraph should be rendered invalid, all DISCs and their stockholders taxable hereunder shall be taxed instead under the remaining portions of this article.

New York Tax Law § 209.1

1. For the privilege of exercising its franchise or doing business in this state in a corporate or organized capacity for all or any part of each of its fiscal or calendar years . . . every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax, upon the basis of its entire net income, or upon such other basis as may be applicable as hereinafter provided, . . . and [the tax] shall be paid as hereinafter provided.

New York Tax Law § 209.6

6. For any taxable year of a DISC, not exempt from tax under paragraph (i) of subdivision nine of section two hundred eight of this article, the taxes imposed by subdivision one of this

section shall be computed only under either clause two or clause four of paragraph (a) of subdivision one of section two hundred ten of this chapter, whichever is greater, and paragraph (b) of such subdivision.

New York Tax Law §§ 210.1-210.3

1. The tax imposed by subdivision one of section two hundred nine of this chapter shall be, in the case of each taxpayer:

(a) a tax (1) computed at the rate of nine per centum on its entire net income, or the portion thereof allocated within the state as hereinafter provided, subject to any modification required by paragraph (d) of subdivision three of this section, or (2) computed at one and six tenths mills for each dollar of its total business and investment capital, or the portion thereof allocated within the state as hereinafter provided, except that in the case of a cooperative housing corporation as defined in the internal revenue code or in the case of a housing company organized and operating pursuant to the provisions of article two of the private housing finance law, the applicable rate shall be four-tenths of a mill, or (3) computed at the rate of nine per centum on thirty per centum of the taxpayer's entire net income plus salaries and other compensation paid to the taxpayer's elected or appointed officers and to every stockholder owning in excess of five per centum of its issued capital stock minus fifteen thousand dollars (except as hereinafter provided) and any net loss for the reported year, or on the portion of such sum allocated within the state as hereinafter provided for the allocation of entire net income, subject to any modification required by paragraph (d) of subdivision three of this section, or (4) one hundred dollars, whichever is greatest, plus

(b) a tax computed at the rate of eight-tenths of a mill for each dollar of the portion of its subsidiary capital allocated within the state as hereinafter provided.

(c) In the case of a taxpayer which is not subject to tax for an entire year the exemption allowed in clause three

of paragraph (a) of this subdivision shall be prorated according to the period such taxpayer was subject to tax.

(d) If the taxable period for which the tax is due is less than an entire year, the minimum tax fixed by clause four of paragraph (a) of this subdivision shall be reduced by twenty-five per centum if the period for which such taxpayer is subject to tax is more than six months but not more than nine months and by fifty per centum if the period for which such taxpayer is subject to tax is not more than six months.

1-a. Notwithstanding any other provision of this chapter, an additional tax computed at the rate of five and three-quarters per centum on business income, or the portion thereof allocated within the state as hereinafter provided, is hereby imposed on every corporation subject to the tax imposed by this article which has gross receipts of five hundred thousand dollars or more for the taxable year from transportation, within this state, by omnibuses having a seating capacity of more than seven persons, other than receipts for the operation of school buses which are excluded from entire net income.

1-b. The computation specified in clause three of paragraph (a) of subdivision one shall not apply to a corporation organized under article fifteen of the business corporation law.

2. The amount of subsidiary capital, investment capital and business capital shall each be determined by taking the average fair market value of the gross assets included therein (less, in the case of business capital, average liabilities deductible therefrom which are payable by their terms on demand or within one year from the date incurred, other than loans or advances outstanding for more than a year as of any date during the year covered by the report, and, if the period covered by the report is other than a period of twelve calendar months, by multiplying such value by the number of calendar months or major parts thereof included in such period, and dividing the product thus obtained by twelve[ )].

3. The portion of the entire net income of a taxpayer to be allocated within the state shall be determined as follows:

(a) multiply its business income by a business allocation percentage to be determined by

(1) ascertaining the percentage which the average value of the taxpayer's real and tangible personal property within the state during the period covered by its report bears to the average value of all the taxpayer's real and tangible personal property wherever situated during such period;

(2) ascertaining the percentage which the receipts of the taxpayer, computed on the cash or accrual basis according to the method of accounting used in the computation of its entire net income, arising during such period from

(A) sales of its tangible personal property where shipments are made to points within this state,

(B) services performed within the state,

(C) rentals from property situated, and royalties from the use of patents or copyrights, within the state, and

(D) all other business receipts earned within the state, bear to the total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties and all other business transactions, whether within or without the state;

(3) ascertaining the percentage of the total wages, salaries and other personal service compensation, similarly computed, during such period of employees within the state, except general executive officers, to the total wages, salaries and other personal service compensation, similarly computed, during such period of all the taxpayer's employees within and without the state, except general executive officers; and

(4) adding together the percentages so determined and dividing the result by the number of percentages; provided, however, that if the taxpayer does not have a regular place of business outside the state other than a statutory office, the business allocation percentage shall be one hundred percent;

Provided, however, that any taxpayer required to adjust its receipts, expenses, assets and liabilities by adding an attributable portion of the receipts, expenses, assets and liabilities of any DISC, as provided by paragraph (i) of subdivision nine of section two hundred eight of this article, shall substitute such adjusted figures in computing the percentages required in subparagraphs one, two and three of this paragraph.

(b) multiplying its investment income by an investment allocation percentage to be determined by

(1) multiplying the amount of its investment capital invested in each stock, bond or other security (other than governmental securities) during the period covered by its report by the percentage, if any, of the entire capital or the issued capital stock, or the gross direct premiums, or the net income, as the case may be, of the issuer or obligor thereof required to be allocated within the state on the report or reports, if any, required of any such issuer or obligor under this chapter or the insurance law for the preceding year, but without regard to any minimum,

(2) adding together the sums so obtained, and

(3) dividing the result so obtained by the total of its investment capital invested during such period in stocks, bonds and other securities (other than obligations of the United States and its instrumentalities and obligations of the state of New York, its political subdivisions and its instrumentalities); provided, however, that in case any investment capital is invested in any stock, bond or other security during only a portion of the period covered by the report, only such portion of such capital shall be taken into account; and provided further, that if a taxpayer's investment allocation percentage is zero, interest received on

bank accounts, on obligations of the United States and its instrumentalities and on obligations of the state of New York, its political subdivisions and its instrumentalities shall be multiplied by its business allocation percentage; provided, however, that with respect to corporations organized under article fifteen of the business corporation law, the investment allocation percentage shall be one hundred percent; and

(c) add the products so obtained.

(d) At the election of the taxpayer there shall be deducted from the portion of its entire net income allocated within the state either or both of the items set forth in subparagraphs one and two of this paragraph, except that only one of such deductions shall be allowed with respect to any one item of property.

New York Tax Law § 210.13

13. (a) So long as the taxation procedures relating to a DISC provided in subparagraph (B) of paragraph (i) of subdivision nine of section two hundred eight of this article are in effect and not rendered invalid any taxpayer which during the taxable year being reported was a stockholder in any such DISC shall be allowed a DISC export credit, to be computed as hereinafter provided, against the tax imposed by this article after allowance of any credit permitted under subdivision eleven and subdivision twelve of this section. The amount of the credit shall be computed separately for each such DISC, based upon its operations during its annual reporting period ending the current taxable year of such stockholder, as follows:

(1) ascertaining the amount, if any, of such taxpayer's attributable share of the total current earnings and profits earned by such DISC for the reporting year which were included in its accumulated DISC income account pursuant to subsection (a) of section nine hundred ninety-six of the internal revenue code of nineteen hundred fifty-four,

(2) ascertaining a percentage by (i) totaling the gross receipts from the sale, lease, rental or other disposition of export property (as defined under subsection (c) of section nine hundred ninety-three of the internal revenue code of

nineteen hundred fifty-four) of the taxpayer by or to such DISC, and (ii) totaling such gross receipts from such export property of the taxpayer shipped from a regular place of business of the taxpayer within this state by or to such DISC and then (iii) dividing the total developed in (ii) above by that developed in (i) above (provided, however, for the purposes of this subparagraph, the tax commission may require such gross receipts to be computed on a similar basis for all such export property to properly reflect the percentage of such gross receipts attributable to export property shipped from a regular place of business of the taxpayer within this state),

(3) multiplying the amount ascertained in subparagraph one of this paragraph by the percentage ascertained in subparagraph two of this paragraph,

(4) ascertaining the amount of the taxpayer's taxable income as determined in subparagraphs one, two and three of this paragraph that is eligible for credit by multiplying the product ascertained in the preceding subparagraph by the taxpayer's business allocation percentage determined as provided in paragraph (a) of subdivision three of this section,

(5) the amount of DISC export credit attributable to the operations of each such DISC is then found by multiplying seventy percent of the taxpayer's taxable income that is eligible for credit, as computed in the preceding subparagraph, by the rate of tax applying to the taxpayer, as provided in subdivision one of this section,

(6) the taxpayer's total DISC export credit is the sum of the DISC export credits attributable to each DISC that qualifies for tax exemption under paragraph (i) of subdivision nine of section two hundred eight of this article, in which it was a stockholder during the taxable year being reported.

(b) The credit allowed under this subdivision for any taxable year shall not reduce the tax due for such year to less

than one hundred twenty-five dollars; nor may any unused credit be carried over to any following year.

New York Tax Law § 211.1

1. Every taxpayer, as well as every foreign corporation having an officer, agent or representative within the state, shall annually on or before March fifteenth transmit to the tax commission a report in a form prescribed by it (except that a corporation which reports on the basis of a fiscal year shall transmit its report within two and one-half months after the close of its fiscal year and except, also, that a corporation which is a DISC shall transmit its report on or before the fifteenth day of the ninth month following the close of its calendar or fiscal year), setting forth such information as the tax commission may prescribe and every taxpayer which ceases to exercise its franchise or to be subject to the tax imposed by this article shall transmit to the tax commission a report on the date of such cessation or at such other time as the tax commission may require covering each year or period for which no report was theretofore filed. Every taxpayer shall also transmit such other reports and such facts and information as the tax commission may require in the administration of this article. The tax commission may grant a reasonable extension of time for filing reports whenever good cause exists.

An automatic extension of three months for the filing of its annual report shall be allowed any taxpayer if, within the time prescribed by the preceding paragraph, such taxpayer files with the tax commission an application for extension in such form as said commission may prescribe by regulation and pays on or before the date of such filing the amount properly estimated as its tax.

New York Tax Law § 211.4

4. In the discretion of the tax commission, any taxpayer, which owns or controls either directly or indirectly substantially all the capital stock of one or more corporations, or substanially

all the capital stock of which is owned or controlled either directly or indirectly by one or more other corporations or by interests which own or control either directly or indirectly substantially all the capital stock of one or more other corporations, may be required or permitted to make a report on a combined basis covering any such other corporations and setting forth such information as the tax commission may require; provided, however, that any corporation which owns or controls either directly or indirectly substantially all the capital stock of a DISC not exempt from tax under paragraph (i) of subdivision nine of section two hundred eight of this article shall be allowed, at the election of such corporation, to make a report on a combined basis covering such DISC, but the failure of such corporation to make such election shall not prohibit the tax commission from requiring a combined report covering such corporation and such DISC; provided, further, that no combined report covering any corporation not a taxpayer shall be required unless the tax commission deems such a report necessary, because of inter-company transactions or some agreement, understanding, arrangement or transaction referred to in subdivision five of this section, in order properly to reflect the tax liability under this article. In the case of a combined report the tax shall be measured by the combined entire net income or combined capital, of all the corporations included in the report. In computing combined entire net income intercorporate dividends shall be eliminated, in computing combined business and investment capital intercorporate stockholdings and intercorporate bills, notes and accounts receivable and payable and other intercorporate indebtedness shall be eliminated and in computing combined subsidiary capital intercorporate stockholdings shall be eliminated, provided, however, that intercorporate dividends from a DISC or a former DISC not exempt from tax under paragraph (i) of subdivision nine of section two hundred eight of this article which are taxable as business income under this article shall not be eliminated.

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